Soonly Metal Works (suing as a firm) v NCN Marketing Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-1620–09 OF 2016
DAVID WONG, HAMID SULTAN AND MARY LIM JJCA
27 FEBRUARY 2018

Civil Procedure — Action — Consolidation of suits — Trial court refused to consolidate suits — Whether both suits pertained to same matters and issues — Whether suits ought to be jointly tried — Whether there was a mistrial or miscarriage of justice — Whether court ought to set aside trial court's order — Courts of Judicature Act 1964 s 71

The plaintiff had built two temporary stores for the defendant subject to certain terms and conditions under a building agreement. There was outstanding payment for work done and in settlement of the outstanding sums, the defendant agreed to transfer its land to the plaintiff. The defendant had also agreed to pay the balance outstanding sums in 12 cash instalments. Subsequently, a draft settlement agreement and a draft sales and purchase agreement were drawn up. The present action was filed by the plaintiff at the High Court to claim for, inter alia, an order of specific performance of the agreements. In defence, the defendant denied that the terms were settled and contended that the settlement was very much dependent on the resolution of the building agreement and complaints relating to work done by the plaintiff. The defendant maintained that there was no settlement based on the following reasons: (a) unilateral increase in construction costs; (b) construction not completed; (c) failure to obtain CCC; (d) building was built 37 ft too far from front; and (e) refusal to sign 'Surat Akuan' for release of bank loan (collectively referred as 'the five reasons'). Four months after the present action was filed, the defendant sued the plaintiff for breach of the building agreement in the same High Court ('Suit 26'). In Suit 26, the defendant relied on the same factual background and used substantially the same matters raised in its defence to the present case. An application to consolidate the two cases was refused in Suit 26 and an oral application for the same was also refused by the trial judge. At the end of the proceedings of the present case at the High Court, the plaintiff's claim was dismissed, hence the present appeal.

Held, allowing the appeal with no order as to costs:

(1) The determination of the plaintiff's claim was dependent on the determination of the construction claim or breach of the building agreement that was filed by the defendant, that was, Suit 26. Suit 26 must

be resolved either first or together with the present claim. It must be jointly tried for it was only after the issue of whether there were any monies outstanding under the building agreement had been determined that the plaintiff's claim for monies outstanding could be properly answered. After all, Suit 26 as well as the '5 reasons' relied on in the defence to the present claim pertain to the same matters and issues arising from the building agreement. Based on the above findings, this was a classic case of mistrial and/or miscarriage of justice and in consequence the court was statutorily duty bound under s 71 of the Courts of Judicature Act 1964 ('the CJA'), to set aside the order of the High Court and order this suit and Suit 26 to be heard together in the High Court. This was not also a fit and proper case to exercise the court's powers under s 69 of the CJA to embark in a process called rehearing the matter in the Court of Appeal (see paras 1, 10 & 14–15).

[Bahasa Malaysia summary

Plaintif telah membina dua stor sementara untuk defendan tertakluk kepada terma dan syarat tertentu di bawah perjanjian pembinaan. Terdapat bayaran tertunggak untuk kerja yang dilakukan dan sebagai penyelesaian untuk jumlah yang tertunggak, defendan bersetuju untuk memindahkan tanahnya kepada plaintif. Defendan juga telah bersetuju untuk membayar baki jumlah yang tertunggak dalam 12 ansuran tunai. Seterusnya, draf perjanjian penyelesaian dan draf perjanjian jual beli telah disediakan. Tindakan semasa telah difailkan oleh plaintif di Mahkamah Tinggi untuk menuntut, antara lain, suatu perintah pelaksanaan spesifik perjanjian-perjanjian tersebut. Dalam pembelaan, defendan menafikan bahawa terma telah diselesaikan dan mendakwa bahawa penyelesaian sangat bergantung pada resolusi perjanjian pembinaan dan aduan yang berkaitan dengan kerja yang dilakukan oleh plaintif. Defendan menyatakan bahawa tidak ada penyelesaian berdasarkan alasan berikut: (a) kenaikan unilateral dalam kos pembinaan; (b) pembinaan belum selesai; (c) kegagalan mendapatkan CCC; (d) bangunan dibina 37 kaki terlalu jauh dari bahagian depan; dan (e) keengganan untuk menandatangani surat akuan untuk pelepasan pinjaman bank (secara kolektif disebut sebagai 'lima alasan'). Empat bulan selepas tindakan ini difailkan, defendan menyaman plaintif di Mahkamah Tinggi yang sama kerana melanggar perjanjian pembinaan ('Guaman 26'). Dalam Guaman 26, defendan bergantung kepada latar belakang fakta yang sama dan menggunakan banyak perkara yang sama yang dibangkitkan dalam pembelaannya kepada kes semasa. Permohonan untuk menyatukan kedua-dua kes telah ditolak dalam Guaman 26 dan permohonan lisan untuk perkara yang sama juga ditolak oleh hakim bicara. Di akhir prosiding kes semasa di Mahkamah Tinggi, tuntutan plaintif telah ditolak, oleh itu, rayuan semasa.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

(1) Penentuan tuntutan plaintif adalah bergantung kepada penentuan tuntutan pembinaan atau pelanggaran perjanjian pembinaan yang telah difailkan oleh defendan, iaitu, Guaman 26. Guaman 26 harus diselesaikan sama ada terlebih dahulu atau bersama dengan tuntutan semasa. Ia mesti dibicarakan bersama kerana hanya selepas isu sama ada terdapat apa-apa wang tertunggak di bawah perjanjian pembinaan telah ditentukan barulah tuntutan plaintif untuk wang tertunggak boleh dijawab dengan betul. Lagipun, Guaman 26 serta 'lima alasan' yang diberi sandaran di dalam pembelaan kepada tuntutan semasa berkaitan dengan perkara dan isu yang sama yang timbul daripada perjanjian pembinaan. Berdasarkan dapatan-dapatan di atas, ini adalah kes klasik bagi salah bicara dan/atau ketidakadilan dan akibatnya mahkamah adalah bertanggungjawab secara statutori di bawah s 71 Akta Mahkamah Kehakiman 1964 ('AMK'), untuk mengenepikan perintah Mahkamah Tinggi dan memerintahkan tindakan semasa dan Guaman 26 untuk didengar bersama di Mahkamah Tinggi. Ini juga bukan kes yang sesuai dan wajar untuk menjalankan kuasa mahkamah di bawah s 69 AMK untuk memulakan proses yang disebut sebagai mendengar semula kes di Mahkamah Rayuan (lihat perenggan 1, 10 & 14–15).]

Notes

For cases on consolidation of suits, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 136–140.

Legislation referred to

Courts of Judicature Act 1964 ss 69, 71

Appeal from: Civil Suit No 22NCVC-7–02 of 2014 (High Court, Muar)

Manian K Marappan (Manian K Marappan & Co) for the appellant.
Diljit Kaur a/p Puran Singh (Diljit & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/plaintiff's appeal came up for hearing on 5 July 2017. From the basic facts of the case as well as the conduct of the defendant denying the plaintiff's claim in this suit and also filing a separate claim against the plaintiff on the same transaction to claim damages for breach of contract and the trial court in this case refusing to consolidate both matters and dismissing the plaintiff's claim, in our view was a classic case of mistrial and/or miscarriage of justice and in consequence we were statutorily duty bound under s 71 of the Courts of Judicature Act 1964 ('the CJA 1964'), to set aside the order of the High Court and order this suit and the defendant's suit to be heard together in the High Court. This is not also a fit and proper case to exercise our powers

under s 69 of the CJA 1964 to embark in a process called rehearing the matter in the Court of Appeal.

[2] As we have ordered a retrial with the defendant's suit, we do not wish to set out the facts and/or application of the law by the learned judge in any detail as we are obliged not to do so under s 71 of the CJA 1964.

[3] The said s 71 of the CJA 1964 read as follows:

> 71 New trial
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> (1) Except as hereinafter provided the Court of Appeal shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction.
>
> (2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the Court of Appeal that the wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties.
>
> (3) A new trial may be ordered on any question without interfering with the finding or decision of the court below upon any other question.

It is also important to note that s 69 must be read together with s 71 and any judicial decisions which had not considered s 71 complained when exercising powers under s 69 must seen to be per incuriam. Section 69 of the CJA 1964 read as follows:

> 69 Hearing of appeals
>
> (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

BRIEF FACTS

[4] The plaintiff's case in this suit relates to a construction claim wherein the defendant is said to have agreed to transfer its land in settlement of monies outstanding for work done by the plaintiff for the defendant. The plaintiff had built two temporary stores for the defendant subject to certain terms and conditions under a 'building agreement'. According to the plaintiff's statement of claim, the parties met on four separate occasions to resolve the matter of the outstanding claims under the building agreement. At two of those meetings, the parties even had their respective lawyers in attendance. The plaintiff claimed that the meetings resulted in an admission by the defendant of the monies owed, that the defendant agreed to settle the sum owed by way of a transfer of a second plot of its land. That plot of land was, at the material time, still charged to OCBS Bank. The defendant is further said to have agreed to pay the balance outstanding sums in 12 cash instalments after the charged land had been auctioned off. A draft settlement agreement and a draft sales and purchase agreement ('SPA') were then drawn up. The plaintiff was in court to claim for, inter alia, an order of specific performance of the agreements. This suit was filed in February 2014.

[5] The existence of the building agreement, the construction and completion of two temporary stores, and the four meetings, two of which the defendant's lawyers were not present, are not in dispute. In the defence filed, what the defendant disputed were the terms of the building agreement contending, inter alia, that the plaintiff was supposed to build four temporary stores but had instead built only two. Even the two stores that were built were alleged to be not in accordance with the approved plans in which case the defendant insisted that the plaintiff had to demolish and rebuild the same. The defendant also claimed that the agreed price of the four stores was RM800,000 and that the plaintiff had unilaterally increased the price to RM1,059,846 without the defendant's knowledge and consent. As for the settlement agreement and the draft SPA, the defendant denied that the terms were settled, contending in essence, that the settlement was very much dependent on the resolution of the building agreement and complaints relating to work done by the plaintiff.

[6] Four months after this suit was filed, relying on the same factual background and using substantially the same matters raised in its defence to the present claim, the defendant sued the plaintiff for breach of the building agreement in the same High Court (No 22NCVC-26–06 of 2014 ('Suit 26')).

[7] An application to consolidate the two cases was refused in Suit 26. An oral application for the same was also refused by the trial judge. This is despite recognising at para 4 of the judgment that the settlement agreement arises from the building agreement wherein the plaintiff had built two temporary stores for the defendant, and that Suit 26 had yet to be heard. The parties then asked for the present case to be heard first. At para 7 of the judgment, the learned judge ordered for the present case to be tried first and further, that the trial be confined to the settlement agreement without touching on the building agreement, its related problems and the issues of costs of construction as these matters had yet to be determined in Suit 26.

[8] At the trial, the defence of no settlement was maintained and the reasons for the defendant's stand was summarised as the '5 reasons' ascribed to the plaintiff; namely:

(i) Reason 1 — unilateral increase in construction costs;

(ii) Reason 2 — construction not completed, passion not delivered;

(iii) Reason 3 — failure to obtain CCC;

(iv) Reason 4 — building was built 37 feet too far from front;

(v) Reason 5 — refusal to sign Surat Akuan for release of bank loan.

[9] The plaintiff's claim was dismissed. The learned judge found that the existence of the settlement agreement was not proved because the terms and conditions had not been agreed. Amongst those terms that had yet to be agreed was the price of the construction of the buildings — 'Tambahan pula harga atau kos sebenar bangunan yang dibina belum lagi dipastikan dengan tepat memandangkan tindakan mengenai Perjanjian Bangunan belum lagi diputuskan oleh Mahkamah ini'. The learned judge asked herself how could the settlement agreement be signed when the actual amount outstanding had yet to be determined; that the subject of the actual costs of construction was an important subject which was yet to be determined in Suit 26 — see para 12(ix).

[10] We agreed with the submissions of learned counsel for the plaintiff that this is a fit case for an order that there has been a mistrial. We were of the view that the determination of the plaintiff's claim was dependent on the determination of the construction claim or breach of the building agreement that is filed by the defendant, that is, Suit 26. Suit 26 must be resolved either first or together with the present claim. It must be jointly tried for it is only after

the issue of whether there are any monies outstanding under the building agreement has been determined that the plaintiff's claim for monies outstanding can be properly answered. After all, Suit 26 as well as the '5 reasons' relied on in the defence to the present claim pertain to the same matters and issues arising from the building agreement: the number of temporary stores to be built, the agreed price of the construction works, to name a few.

[11] The court must never conduct trials or adjudicate related claims that arise from the same events and concern the same or common issues, especially where they involve the same parties represented by the same solicitors, on instalment basis or with abject refusal to see the impracticalities of their trial directions such that injustice result as has happened here. It was asking for the impossible to direct the parties to confine themselves to only the matter of the settlement agreement and the sale and purchase agreement when the matter of the building agreement was yet to be unresolved. Refusing the plaintiff the right to call its witnesses including subpoenaed witnesses only added further injustice.

[12] To save judicial time to demonstrate mistrial and/or miscarriage of justice, we set out in verbatim a part of the submissions of learned counsel for the plaintiff which reads as follows:

> REFUSAL OF CONSOLIDATION AND JOINT TRIAL APPLICATIONS
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> 11. An application for consolidation of this case with the other case was made by the Plaintiff in the other case but the High Court refused to grant the order for consolidation.
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> 12. Thereafter, an oral application was made in this case for this case to be heard jointly with the other case but this too was refused.
>
> (a) Please see Paragraph 5 of Grounds of Judgment ('Grounds'), page 7, Rekod Rayuan Tambahan where it is recorded that an application for 'kedua-dua tindakan didengar bersama. Tetapi permohonan Plaintif tersebut telah ditolak oleh YA Hakim terdahulu berdasarkan bantahah oleh pihak Defendan'.
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> (b) However, the application made before the previous learned Judge in the other case was to consolidate the two matters, not for them 'didengar bersama' (see Pages 290 to 300, Jilid 2, Rekod Rayuan).
>
> (c) The application made in this case was for the joint trial but this was refused with the learned Judge commenting that she could not make an order which is inconsistent with her predecessor.
>
> (d) The learned Judge was clearly wrong when she equated '*consolidation*' with '*joint trial*'.

13. The learned Judge in the other case was wrong to refuse the application for consolidation and the learned Judge in this case was wrong to refuse the application for a joint trial.

(a) This is because the other case is predicated on the same allegations which are used to found the 5 Reasons and the Defence in this case was predicated on the 5 Reasons and as such this case *is inseparable* from the other case, in fact, the other case should be brought as a Counterclaim in this case. (Emphasis added.)

(b) There was no appeal lodged against the refusal of the applications because it was thought (perhaps mistakenly) that they were unappealable interlocutory orders.

THE GRAVE INJUSTICE TO THE PLAINTIFF

14. The learned Judge should have held that the Defendant's other case should have been filed as a Counterclaim in this case since they arose out of the same transaction and involved the same parties and witnesses and that since it was not filed as a Counterclaim, the other case should be consolidated or at least heard together with this case.

15. Instead, the learned Judge in this case erred in a fundamental way by insisting that she stayed consistent with her predecessor and that the case be heard separately (although her predecessor ruled against consolidation, not joint trial).

16. Further, the learned Judge proceeded to deny the Plaintiff the right to call 9 other witnesses on the ground that their evidence is not relevant here but only in the other case and allowed the Plaintiff to call 2 witnesses.

(a) The other 9 Plaintiffs witnesses were vital to rebut the 5 Reasons which formed the backbone of the Defence.

17. To make matters worse, the Judge directed the Witness Statement of SP-1 to be expunged of all matters which should be raised only in the other case although they were relevant to rebut the 5 Reasons in the Defence.

18. As a result of the Judge's interference into and denial of the Plaintiffs right to call its own witnesses and conduct its own case *which are essential features of an adversorial system,* a grave injustice has been caused to the Plaintiff and their case.

(a) This Court of Appeal in *Syed Ibrahim bin Syed Mohd v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49 at 74 said:

... it is left to the parties in a given case to present their respective cases in the manner as appears to them and not for the courts to direct or dictate to them as to how to conduct their case. A court would not descend into the arena of the parties except possibly in one of those situations where not, to do so would defeat the rights of a party altogether and to cause a gross injustice to him.

(b) The Judge should only adjudicate on the pleadings and evidence produced by the parties and act as an *impartial referee ... Jones v National Coal Board* [1957] 2 QB 55 at 64 per Lord Denning.

(c) In *Payremalu a/l Veerappan v Dr Amarjeet Kaur & Ors* [2001] 3 MLJ 125,

it was said that a judge should just be a passive umpire of the facts.

(d) And this Court recently sitting in Kuching held in *Ting Sieh Chung @ Ting Sie Chung v Hock Peng Realty Sdn Bhd* [2016] 5 MLJ 342 held that:

[13] ... From the perspective of an adversarial system in civil litigation, both parties bear the corresponding burden to prove its respective case, and as such, both parties are at liberty to adduce evidence to establish its own case.

ABSURDITY ARISING OUT OF SEPARATING THE CASE INTO 'THIS CASE' AND 'THE OTHER CASE' — Paragraphs 2 and 3, Memorandum Rayuan Tambahan

19. The Learned Judge had insisted that the issue in this case was whether there was an oral settlement agreement reached and that the issue in that other case was about the construction contract and she was adamant to separate the facts and evidence into two clear compartments although there was the connecting 5 Reasons staring from the Defence.

(a) At Paragraph 7 of the Grounds (Page 8, Rekod Rayuan Tambahan), the learned Learned Judge made it clear that in this case, she did not want to touch on matters relating to the construction and said, 'Memandangkan tuntutan mengenai Perjanjian Bangunan mengenai Bangunan Stor Sementara belum lagi dibicarakan oleh Mahkamah ini, Mahkamah ini telah mengarahkan supaya perbicaraan ini dijalankan terhad untuk Perjanjian Penyelesaian tanpa menyentuh pembinaan bangunan, masalah dan kos pembinaan bangunan kerana isu tersebut belum diputuskan'.

(b) Yet, it was the circumstances of the construction and the Defendant's allegations concerning the Perjanjian Pembinaan which form the basis for the 5 Reasons used by the Defendant here to defend the Plaintiff's claim based on compromise or settlement agreement.

(c) Now with the Defendant's Defence based on the 5 Reasons, in order to arrive at a conclusion of the issue 'Was there a settlement agreement reached?', it was encumbent and absolutely necessary for the Court to examine the truth of those 5 Reasons and as such, it was wrong for the Court to hold adamantly that it would not delve into issues relating to the construction.

(d) The learned Judge ought to take into account of all the facts surrounding the construction and the disputes and problems between the parties so as to make an assessment on whether the 5 Reasons were true or just mere afterthoughts or had been rectified.

20. As such, the oral settlement agreement and the construction agreement were closely connected by reason of the 5 Reasons stated in the Defence in this case and yet the learned Judge was adamant throughout the trial to keep them distinctly apart.

(a) Yet, the learned Judge seemed to recognise their connection when she commented at *Paragraph 4 of the Grounds of the Grounds (Page 7, Rekod Rayuan Tambahan)*, that 'Perjanjian Penyelesaian tersebut timbul dari Perjanjian Bangunan Stor Sementara antara kedua pihak di mana Plaintif telah membuat

bangunan untuk Defendan. Perjanjian Bangunan Stor Sementara tersebut masih belum dibicarakan. A

21. The Judge's insistence to divide the case into two instalments of litigation had done much damage and injustice to the Plaintiff.

(a) At *Paragraph 12 of the Grounds (Page 18, Rekod Rayuan Tambahan)*, the learned Judge held that the oral settlement agreement as alleged by the Plaintiff did not exist because 'ianya tidak disimpulkan atau dimuktamadkan akan terma-termanya'. B

(b) As to why she held as such, the learned Judge stated her reasons in the following sub-paragraphs (i) to (x). C

(c) In sub-paragraph (i), the learned Judge held that she could not determine the completion of the construction and the total construction costs as RM1,059,846.00 as claimed by the Plaintiff because 'isu pertambahan kos ini dan isu kesempurnaan pembinaan bangunan kerana terdapat satu lagi tindakan lain yang melibatkan kedua-dua pihak untuk isu perjanjian tersebut ... Oleh itu, semua hujahan Plaintif mengenai bangunan tidak dapat dipertimbangkan di peringkat ini'. D

(d) The learned Judge should consider this issue because Reason 1 of the 5 Reasons states that the Plaintiff unilaterally increased the construction price from RM800,000.00 to RM1,059,846.00 and the learned Judge must decide whether Reason 1 was true or a pure unadultered lie. E

(e) If the learned Judge were to take into consideration the relevant evidence and not discard them as belonging to the other case and could be considered here, the learned Judge would have found that: F

(i) The construction had been completed; and

(ii) The total construction cost was RM1,059,846.00 and this was known to and accepted by the Defendant; and

(iii) The Defendant had paid RM90,000.00 in 6 equal monthly instalments of RM15,000 each AFTER construction had been completed and AFTER knowing and agreeing that the total construction had gone up from RM800,000.00 to RM1,059,846.00 due to variation and additional works. G

(iv) The Defendant had agreed to contra his land (as per Plaintiff's case here) to settle the balance of RM989,846.00. H

22. It was most unfair and wrong for the learned Judge to hold in effect as follows:

(a) There were issues necessary to determine whether there was a settlement agreement which had not been decided in that other case; and I

(b) The issues in that other case could not be decided here as this Court had decided against any consolidation or a joint trial with that other case; and

(c) Because those issues had not been decided, the terms and conditions of the alleged settlement agreement were not firmed; and

(d) Because of that, there was no settlement agreement reached.

23. As said, the Judge was essentially saying that, 'I find that there was no settlement agreement because certain issues have not been decided and I cannot decide thiose issue because they are in the other case'. The Plaintif was put and caught in a vicious cycle of injustice.

[13] The learned counsel for the respondent was candid on the issue of mistrial and/or miscarriage of justice and did not resist the facts in relation to mistrial and/or miscarriage of justice in any material sense before us.

[14] After hearing the parties on mistrial and/or miscarriage of justice, we took the view that it was a fit and proper case to exercise our statutory power. In consequence, we set aside the order of the High Court and directed the matter to be heard together with Suit 26.

[15] For reasons stated above, the appeal was allowed with no order as to costs. The order of the High Court was set aside. This suit was to be heard together with Suit No 22 NCVC-07–06 of 2014. Deposit was to be refunded.

We hereby ordered so.

Appeal allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar